

STATE OF MICHIGAN
COURT OF APPEALS

DARRELL BENNETT and DOROTHY J.
BENNETT,

UNPUBLISHED
May 12, 2005

Plaintiffs-Appellees,

v

No. 250694
Wayne Circuit Court
LC No. 03-303966-CH

ODIS DAVIDSON, a/k/a OTIS DAVIDSON,

Defendant-Appellant,

and

DEBRA DAVIDSON,

Defendant.

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant, Odis Davidson,¹ appeals as of right an order granting a default judgment in favor of plaintiffs. We affirm.

In 1997, the parties entered into a land contract, whereby defendants agreed to buy from plaintiffs a parcel of land in Flat Rock. Defendants paid a down payment and agreed to make monthly payments until July 2007. Defendants were also required to maintain insurance and pay all taxes and assessments. The agreement contained an acceleration clause, which provided plaintiffs the option to foreclose if defendants were in default for over forty-five days. Defendants stopped making their required monthly payments in 2002, failed to pay the 2002 taxes, and failed to provide proof of insurance. Plaintiffs exercised the option to foreclose. Pursuant to the acceleration clause, the total amount of the contract was due in January 2003.

¹ Debra Davidson has not joined this appeal. Where we use “defendant” in singular form, it refers only to Odis Davidson.

Defendant argues² that procedural errors in the case denied him due process of law. We review de novo questions of law. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

Defendant contends that defendants were not timely and properly served with plaintiffs' complaint. Process may be served on an individual by delivering it to the individual personally or by sending a copy of the complaint by registered or certified mail. MCR 2.105(A). On proper showing that service cannot be reasonably made, the court may permit service of process by another manner reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard. MCR 2.105(I)(1). If a request for alternate service is made pursuant to MCR 2.105(I), service may be effectuated by posting. MCR 2.106.

After several failed attempts to serve defendants with the complaint, plaintiffs filed a motion for alternate service. The motion stated that the process server attempted to serve defendants on four separate occasions. The trial court issued an order for alternate service, which required first class certified mail to "Otis Davidson"³ and "Debra Davidson," separately, and a tacking to the door of the residence on the subject property. The summons was posted, and the certified mailings were sent. The proper procedure was followed, and defendant was timely and properly served with the complaint.

Defendant claims that the trial court did not give defendants enough time to respond to the complaint. MCR 2.108(A)(1) provides defendants twenty-one days after being served to file an answer. Defendant admitted that he received a posting on his door on March 22 or 23, 2003. Even if March 23, 2003 is used to calculate the time, defendant's April 22, 2003, reply was untimely because it was filed more than twenty-one days after he admittedly received notice of the lawsuit. Furthermore, the trial court gave defendants twenty-one days after the hearing on the motion for default to file a proper answer. The order provided that the trial court would enter a default judgment against defendants if they failed to file the answer within the allotted time and pay plaintiffs' costs by August 1, 2003. Defendant therefore had an appropriate amount of time to respond to plaintiffs' complaint.

² In his "Statement of Issues Presented," defendant lists twelve issues without presenting corresponding arguments in his in propria persona brief. It is insufficient for defendant "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Moreover, defendant's arguments found in the brief are not listed in the statement of issues presented, and are therefore considered waived. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). We will attempt to restate the issues defendant appears to present in his brief and address them accordingly.

³ We note that this mail was addressed to "Otis Davidson," and defendant's name is actually "Odis Davidson."

Defendant next argues that his name was misspelled as “Otis Davidson” on the complaint and that the trial court erred by allowing plaintiffs to alter the caption to correctly reflect his name, “Odis Davidson.” The clerical error regarding the spelling of defendant’s name was rectified in plaintiffs’ May 13, 2003, answer to defendant’s motion to vacate the default judgment. MCR 2.612(A)(1). Because the error did not affect the procedure or merits of the case, it was appropriate for the trial court to fix the error and change the case caption.

Defendant maintains that the court did not have proper jurisdiction over the case because of these defects. As discussed *supra*, there were no defects in this case that denied defendant due process or that would usurp the trial court’s jurisdiction.

Defendant contends that the trial court abused its discretion by granting a default judgment in favor of plaintiffs. We review a trial court’s decision to enter default judgment for an abuse of discretion. *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

If a deadline to file a reply to a complaint is missed, the plaintiff may request that the defendant be defaulted pursuant to MCR 2.603(A). *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 222; 600 NW2d 638 (1999). Generally, default is the remedy against a party who fails to “plead or otherwise defend” in an action. MCR 2.603(A)(1); *Burton v Reed City Hosp Corp*, 471 Mich 745, 755-756; 691 NW2d 424 (2005). MCR 2.603(D) provides that a default judgment may be set aside if good cause is shown and an affidavit of facts showing a meritorious defense is filed. *ISB Sales Co, supra* at 527-528. Good cause is satisfied if there is “a substantial irregularity or defect in the proceeding on which the default is based or a reasonable excuse for failure to comply with the requirements that created the default.” *Id.* at 531. Pursuant to MCR 2.603(D)(4), an order setting aside a default “must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment,” and the order “may also impose other conditions the court deems proper, including a reasonable attorney fee.”

At the evidentiary hearing, two process servers testified that four separate attempts were made to serve process on defendants. After the order of alternate service was entered, the service was posted on the front door of the residence. Defendant testified that he first received notice of the lawsuit when he saw the posting on his door on March 22 or 23, 2003. Defendant stated that he refused service of the certified letters because the letters were addressed to “Otis Davidson” instead of “Odis Davidson.” At the close of the hearing, the trial court set aside the entry of default, requiring defendants to file a proper answer to the complaint by June 30, 2003 and pay the costs that plaintiffs had incurred until that point, specifically \$3,000, by August 1, 2003. The trial court stated that it would enter a default judgment against defendants if they failed to fulfill these two conditions.

On August 1, 2003, the trial court heard another motion on the entry of default and gave defendants one additional week to pay the \$3,000. Defendants did not pay the money by August 8, 2003, and therefore, the trial court entered a default judgment. Because the trial court followed all proper procedures, including giving defendant an additional week to pay the \$3,000, a default judgment was properly entered. It was not necessary for the trial court to conduct a full trial on the merits when defendant failed to comply with the liberal conditions that the trial court imposed to set aside the default.

Defendant asserts that, under *Haines v Kerner*, 404 US 519, 520-521; 92 S Ct 594; 30 L Ed 2d 652 (1972), it is unlawful for summary judgment to be entered against a pro se litigant. However, the holding of the case indicates only that a pro se litigant should be held to less stringent standards than formal pleadings require. Further, contrary to defendant's argument, summary judgment was not entered against defendant in the instant case. Rather, a default judgment was entered. Accordingly, the trial court did not abuse its discretion by entering default judgment against defendants.

Defendant argues that the trial court abused its discretion in denying his motion for the trial judge to recuse himself. If a challenged judge denies a motion to disqualify, in a court having two or more judges, on the request of a party, the challenged judge must refer the motion to the chief judge for a de novo review. The requirement that the motion be submitted to the chief judge is not discretionary. MCR 2.003(C)(3); *In re Contempt of Steingold*, 244 Mich App 153, 160; 624 NW2d 504 (2000). Further, MCR 2.003(C)(1) requires that a motion to disqualify "be filed within 14 days after the moving party discovers the ground for disqualification." *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996). The moving party must present an affidavit including all grounds for disqualification that are known at the time the motion is filed. MCR 2.003(C)(2); *Cain, supra* at 494.

Because defendant did not file his motion within fourteen days, did not appear at the hearing on the motion, and did not challenge the denial of his motion to the chief judge, this issue is not preserved for appeal and will be reviewed for plain error affecting his substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

Only under extreme circumstances does due process require judicial disqualification. *Meagher v Wayne State Univ*, 222 Mich App 700, 726; 565 NW2d 401 (1997). There is a "heavy presumption of judicial impartiality," and there must be evidence of actual bias or prejudice against a defendant to overcome this presumption. *Cain, supra* at 497. Further, the bias or prejudice must be personal and must commonly have its basis in events outside of the judicial proceeding. *Id.* at 495-496. Without more, judicial rulings seldom establish disqualifying bias or prejudice. *Id.* at 496.

In this case, no such circumstances requiring judicial disqualification existed. Defendant claims that plaintiffs and the trial court allowed the process server to give false testimony when he testified that he saw a woman who looked like Debra Davidson at the house when he went to serve process. However, there is no basis for this accusation, and it is of no consequence whether Debra Davidson was at the house. Therefore, even if the perjury existed, and the trial court was privy to it, there is no indication that it affected the outcome of the proceeding. There is no indication that the trial court was prejudiced against defendant or that the trial judge should have disqualified himself.

Defendant also claims that the trial court improperly charged him \$3,000 to allow defendants to proceed with their claim. However MCR 2.603(D)(4) dictates that an order setting aside a default "must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment" and the order "may also impose other conditions the court deems proper, including a reasonable attorney fee." The trial court asked plaintiffs' attorney what costs had been incurred to that point, and reduced the total costs from \$4,500 to \$3,000. The court properly required defendants to pay \$3,000 as a condition to

setting aside the default, and this requirement offers no evidence of bias against defendants. Therefore, the trial court did not err in denying defendants' motion for the trial court judge to recuse himself.

Lastly, defendant argues that the trial court conducted ex parte hearings and improperly proceeded with judgments regarding this case despite the case being on appeal. Because defendant failed to raise this issue below, it is unpreserved, and we review it for plain error affecting defendant's substantial rights. *Veltman, supra* at 690.

Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard. The notice must be reasonably calculated to apprise any interested parties of the pendency of the action and must afford them an opportunity to present objections. *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, ___; 692 NW2d 68, 74 (2004). A hearing that is ex parte is defined by Black's Law Dictionary as: "Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." Black's Law Dictionary (6th ed). Defendant argues that the trial court improperly conducted an ex parte hearing confirming the judicial sale of the foreclosed property and awarding possession to plaintiffs without notice to defendant. However, a proof of mailing dated February 20, 2004 indicates that defendant was mailed a copy of plaintiffs' motion for the order, the proposed order, the request for hearing, and the notice of hearing. Therefore, it is not considered an ex parte hearing, despite defendant's failure to attend.

Defendant also contends that the trial court gave plaintiffs possession of the property despite the fact that the case regarding the property was on appeal. Under MCR 7.209(A)(1), in a civil case, an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless otherwise ordered by a stay pending appeal. *Bass v Combs*, 238 Mich App 16, 24; 604 NW2d 727 (1999). Defendant did not properly request a stay or file a stay bond, as required by MCR 7.209 and MCR 7.101(H)(1)(b), and therefore, it was not necessary for the trial court to refrain from proceeding with judgments regarding the property. Further, the property was given to plaintiffs because considerable damage had been done to it while in defendants' possession. The trial court provided that its award of the property to plaintiffs would be revoked if defendants complied with a list of provisions to ensure that the structures on the property would suffer no further damage, including repair of the broken windows and proof of the restoration of the utility services. Accordingly, the trial court did not err in granting plaintiffs' motion for possession of the property.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin